No. 10,094

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, owners of Diesel Screw "Blue Sky," her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

APPELLANTS' REPLY BRIEF.

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The appellee does not in his brief challenge the correctness of appellants' "Statement of the Case" wherein the facts are set forth with reference to the pages of the Apostles on Appeal relied upon in support thereof. Appellants however have the following comments to make with reference to the appellee's "Statement of Facts" set forth on pages 1 to 3, inclusive, of appellee's brief:

Appellee's statement of facts is not complete and is misleading in at least one particular, to wit: "The libellant had remained on board as it was very hot and he was awaiting the *return* of the Skipper to determine if all the work had been completed." (Appellee's Br. p. 3.)

Aside from the fact that the appellee testified conclusively on his direct examination and his cross-examination that all work of every kind and character had been fully completed before any of the fishermen had their lunch, it is obvious that the appellee is representing to this Court that there was some testimony given which justifies the statement made in the appellee's brief. The statement is supposed to be supported by the record in the Apostles on Appeal [fol. 150].

The record shows that appellee was asked by his proctor why he stayed on the boat after he had had something to eat. The answer, verbatim, was as follows:

> "I stayed on the boat; there was *nothing* doing. I expected the Skipper was going to come down and see if everything was all right."

Appellants objected to the question which elicited this answer and moved to strike out the following portion of the answer: "I expected the Skipper was going to come down and see if everything was all right." The objection to the question: "Where (*sic*) did you say (*sic*) on the boat after you had something to eat?" (which obviously should have been: "*Why* did you *stay* on the boat after you had something to eat?") was made upon the grounds that it called for the appellee's conclusion and opinion and a self-serving declaration. This objection was overruled but an exception was noted. Appellants then moved "to strike out this part of the answer, particularly 'and I expected the Skipper was going to come down to see if every-

thing was all right,'" upon the ground that "it is not competent proof of any fact and states his conclusions and opinions, and is an expression of his ideas, if he ever had any such." [App. pp. 164-165.]

The objection should have been sustained and in lieu of that ruling the motion to strike should have been granted. As this appeal is a trial *de novo,* the appellants respectfully urge that the objection should now be sustained and the answer should be stricken from the record or at least that part of the answer specifically referred to in the motion to strike should be stricken out. Anyone who reads the record can see that the testimony given by the appellee on page 165 of the Apostles on Appeal was pure fiction injected into the case for the purpose of attempting to show some *compelling* reason for the presence of the appellee on the ship at the time of the accident. It had been conclusively established by the appellee's personal testimony prior to the stage of the proceedings now under discussion, that there was absolutely no reason whatever, connected with any service for the ship, justifying appellee's presence on the ship after he had finished his lunch.

Appellants also contend that the appellee does not in his "Statement of Facts" correctly or fairly give the substance of appellee's belated testimony. It is garbled and changed in a serious respect. Reading the appellee's brief, one would get the impression that the master of the ship had been upon the ship on the day of the accident. This must

have been the intention of appellee in narrating his alleged testimony because the appellee could not be "awaiting the *return* of the Skipper" unless the Skipper had been on the ship, had left, and was going to return, to the knowledge of the appellee. A person does not return to a place unless the person has already been to that place. It is peculiar to say the least that appellee does not set forth an *accurate* narrative of his testimony with reference to this "after-thought" reason for staying on the ship after lunch. The failure to correctly narrate the actual testimony and the substitution of a narrative which means something different from the actual testimony cannot be the result of inadvertence because the verb "return" was not used at all in the appellee's testimony.

Appellee testified on direct examination as follows:

I was going to go home from the boat because we were through with that morning's work. It was so hot, I didn't want to walk up and down, on account of the weather was so hot. We had finished everything we had to do before we left. Everything was completely through. [Ap. p. 99.]

On cross-examination appellee testified as follows:

(1) On the day of the accident the work I did personally was fixing what they call the scoop net. [Ap. pp. 117-118.]

(2) I quit working on the scoop net at 11 o'clock in the morning. Between 11 o'clock in the morning and 12 o'clock noontime on the date of my accident we had our

lunch. I can't tell exactly the time, the hour, but after we *finished* the work we went to lunch. I and the rest of the crew started to eat lunch at approximately 11 o'clock in the morning of the day of the accident. When I got finished with my lunch it was approximately 12 o'clock on the day of the accident. I had my accident around 1:30, close to 2 o'clock.

> "Q. What did you personally do between the time you finished your lunch and the time you had your accident? A. As you know it was very hot at that time and the other ones went away; some of them went away; I and some of our crew stayed in the boat, *because it was hot.* That is *all.*"

Between the time I finished my lunch and the time of the accident I drank beer; we had beer, because it was hot.

> "Q. What did you do between the time you started to eat lunch and the time you had your accident? A. We stayed on the boat *because it was very hot,* and I stayed myself.
>
> Q. What else did you do beside staying on the boat from the time you started your lunch and until the time you had your accident? A. Nothing." [Ap. pp. 118-121.]

It is quote obvious that the truth of the entire matter is simply this: From the time the appellee finished his lunch he loitered on the ship for his own convenience and he was not in the service of the ship at the time he was injured. His self-serving declaration of an alleged thought

which he now claims to have then had in his mind in a spurious attempt to show that his continued presence on the ship had some connection with a service to the ship is of no probative value and should be disregarded by this Court in view of the *facts* testified to by the appellee which demonstrate that *if* the appellee did anything which was a service to the ship at all it was "completely through," as appellee himself expressed it, prior to approximately 11 o'clock in the morning when he started his lunch and that the only reason he remained on board after lunch was that it was hot and there was some free beer available which he proceeded to drink.

This trial *de novo* should result in a reversal and a final decree in favor of the appellants. There is no equity in appellee's attempt to collect wages, maintenance or cure from the appellants.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellants.